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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 179

STANDARD ACCIDENT INSURANCE COMPANY AND ALBERT E. McKENZIE, AS TRUSTEE IN BANKRUPTCY OF THE GRAVES-QUINN CORPORATION,

Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

M. CARL LEVINE,
DAVID MORGULAS,
ALBERT FOREMAN,
Counsel for Petitioner.

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No. 179

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Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, and Standard Accident Insurance Company, respectfully submit this petition for a Writ of Certiorari to review the decision of the Court of Claims of the United States, which sustained the demurrer of the respondent dismissing the third cause of action of the Standard Accident Insurance Company, and which was also the first cause of action of Albert E. McKenzie, as Trustee, which decision was rendered by the Court of Claims under date of April 2, 1945.

History of the Case

The petition in this case alleges three causes of action by petitioner, Standard Accident Insurance Company, the third cause of action being also the first and only cause of action alleged by petitioner, Albert E. McKenzie as Trustee in Bankruptcy. Respondent's demurrer is directed to the third cause of action of the Standard Accident Insurance Company and as a first cause of action by Albert E. McKenzie as Trustee in Bankruptcy.

The petition in the first cause of action on behalf of the Standard Accident Insurance Company, as surety on a performance bond of the Graves-Quinn Corporation under a contract with respondent, claims $72,976.07 as the excess costs incurred by reason of alleged misrepresentations in the specifications and drawings as to conditions at the site of the work. The second cause of action is for recovery of $15,245 deducted by defendant as liquidated damages for delay in completion of the contract. The third claim, made as a third cause of action by the Standard Accident Insurance Company and as a first cause of action by Albert E. McKenzie as Trustee in Bankruptcy in the Graves-Quinn Corporation, is for damages of $397,200 for alleged breach of the contract by the respondent. Under date of April 2, 1945, the Court of Claims of the United States handed down its opinion sustaining the demurrer. The opinion is not officially reported as yet and is found at R. 38-42.

Summary Statement of the Matter Involved

Under date of September 14th, 1940, Graves-Quinn (hereinafter called the Contractor) entered into a contract with the United States of America, acting through the War Department, for the construction of temporary barracks at Harbor Defenses, at Boston, Mass., Narragansett Bay, Portland, Maine, and Newport, Rhode Island, for the lump

sum price of $1,008,800 (R. 16). The contracts provided for construction of some of the buildings within sixty calendar days and others within ninety calendar days after notice to proceed (R. 17-18).

The third cause of action, which was the subject of the instant demurrer, alleges that at the time the Government advertised for bids for the contract in question, it had full knowledge that it intended to enter into very substantial construction contracts at Camps Edwards and Devens at a cost-plus-fixed-fee basis, and that the Government knew that as a result thereof any contractor having a lump sum contract in the immediate vicinity would be compelled to meet abnormal circumstances not contemplated or agreed to.

It is then further alleged that the Contractor was prevented from performing its contract in the manner contemplated in that the effect of the Government's action was that the Contractor was unable to employ laborers and mechanics in the normal course, said normal supply of laborers and mechanics being drawn to the cost-plus-fixed-fee jobs and unless the Contractor permitted laborers to be employed for longer hours resulting in the payment of overtime wages, practically no laborers would be available, and with the further result that the normal supply of competent laborers and mechanics was drawn to the cost-plus-fixed-fee contracts and the Contractor was left with inefficient sources from which to draw his laborers, and further that the effect of the award of the cost-plus-fixed-fee contracts was to raise the price of the materials in the immediate vicinity, thereby forcing the Contractor to pay higher prices for materials necessary to the performance of its contract.

The complaint then alleges that the Contractor was compelled to expend $397,200 more to complete the contract

work than it would have, had the contract been carried out as originally contemplated.

The Government urged in support of its motion to dismiss that the acts complained of were committed in the sovereign capacity of the Government, which applied with equal force against all generally. It is the substance of our contention that the acts of the Government were directed particularly against the Contractor in the case at bar and several others in the immediate vicinity, as distinguished from any legislation that might affect contractors generally throughout the country.

Statute Involved

Act July 2, 1940, C. 508, 54 Stat. 712, Title 50, App. Sec. 1171:

> "In order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter;
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> • • • • • • •
>
> *Provided further,* That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form

of contract when such use is deemed necessary by the Secretary of War."

Jurisdiction of This Court to Grant Certiorari

Jurisdiction of this Court to review the aforesaid judgment is granted by 28 U. S. C. A. 288.

The decision sought to be reviewed was rendered by the Court of Claims of the United States.

This application is made within the three months allowed by 28 U. S. C. A. Sec. 350. The order of the Court of Claims of the United States was rendered April 2, 1945.

Questions Presented

The question presented in this case is whether the Government, having the right and power to either let contracts after public bidding on a lump sum basis, or award cost-plus contracts, can, after letting a contract on a lump-sum basis on public bidding, then let cost-plus contracts in the very same locality, thus causing the first contractor who bid for and received a lump sum contract to complete his contract under increased costs and under difficulties never originally contemplated, when it can be specifically shown that the increased costs and difficulties were due directly to the cost-plus contracts being performed in the same locality.

2. Does the Government in the exercise of its war powers occupy a different status in dealing with its contractors than a private citizen?

Reasons for Granting the Petition

The Court of Claims has passed on a most important question involving Federal construction contracts arising during, before and after the Second World War. While this Court had occasion to consider a somewhat similar situation arising during the First World War, in *Maxwell*

v. *The United States,* 271 U. S. 647, we believe that the cited case can be readily distinguished from the one at bar. There is no Federal opinion that we can find wherein the very same department of the Government was permitted to enter into a construction contract and then take such action, even in its sovereign capacity, as might render the performance of the contract first entered into more onerous and expensive. We are not dealing here with the question of the right of the Government to take any action it chooses in furtherance of its war powers; we are concerned solely with whether an injured party is entitled to legal redress if actual damage is the result of the exercise of those war powers.

It is respectfully submitted that the Court of Claims improperly concluded that the Government cannot be held legally responsible in damages if it can be shown that its action resulted in the loss in question, on the excuse that the action taken was in furtherance of the Government's conceded war powers.

Conclusion

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari may be issued out and under the seal of this Court directed to the Court of Claims of the United States to the end that the judgment of said Court may be reviewed and reversed, and for such other and further relief as may be just and proper.

Dated: June 20, 1945.

M. CARL LEVINE,
DAVID MORGULAS,
ALBERT FOREMAN,
Attorneys for Petitioners,
521 Fifth Avenue,
New York City, N. Y.

By DAVID MORGULAS.

DAVID MORGULAS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 179

STANDARD ACCIDENT INSURANCE COMPANY AND ALBERT E. McKENZIE AS TRUSTEE IN BANKRUPTCY OF THE GRAVES-QUINN CORPORATION,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

The Court Below Was in Error in Holding That the Facts Alleged Were Insufficient to Show a Breach of the Contract.

The Government urged in support of its demurrer that the acts complained of were committed in its sovereign capacity and applied with equal force against all generally. In substance, the Court below upheld that contention. It is our contention that the acts of the Government were directed particularly against the Contractor in the case at bar and several others in the immediate vicinity as distinguished from legislation that might affect contractors generally throughout the country.

We contend that there is a vast difference between statutes pertaining to tariff, embargo, priority regulations, etc., which affect all alike and Government action in letting a contract in a specific locality, and then going into that very locality and making it impossible for a single contractor or a group of contractors to perform their contracts under conditions which existed at the time of the advertisement for bids. Our complaint is not directed against any Governmental enactment; we complain of the action of the War Department in its capacity as a contracting party.

The Contractor's bid was submitted on September 10th. At that time Congress had already passed the Act of July 2nd, 1940 which gave the Secretary of War the option to enter into cost-plus-fixed-fee contracts or lump sum contracts after public advertisement (54 Stat. 712).

The Contractor had the right to expect that the War Department had entered upon a policy of awarding lump sum contracts in the immediate vicinity of the plaintiff's construction. The War Department then had two alternatives and having adopted one, which was known to be the more economical, plaintiff had no reason to believe that immediately *thereafter* the Government would adopt the policy of entering into cost-plus-fixed-fee contracts. We contend that having had the choice of two types of contracts and having chosen one for the instant Contractor, the latter had every reason to believe that the Government would not adopt the other choice, in the Contractor's very back yard. The Government might just as well have cut the amount payable by fifty percent for, just as bad money drives good money out of circulation, so is it an economic postulate that cost-plus contracts make it impossible for lump sum contractors to compete for labor and material, except at a great loss.

Let us suppose that an owner of a piece of property on which ten houses are to be constructed makes a contract with "A" for five houses at a fixed price and dictates to him what price he is to pay for labor and fixes a most stringent time for performance. Immediately on making this contract the owner then decides to ignore costs and begins construction of the remaining five houses himself, advertising that he will pay more for labor and material than "A" can conceivably afford because of his restricted lump sum price. Bearing in mind that the labor supply is practically limited to the locality of the construction, the owner's action would clearly be an interference with the Contractor's performance.

We are not dealing with a situation where the owner has made a second contract with a stranger who in turn offers higher wages. We are dealing with the action of the owner himself in making those representations. To say that an owner can compete on unequal terms with his own contractor and knowingly and wilfully make his performance of a million dollar contract turn into a loss of almost $400,000 and all this without any legal redress on the part of the Contractor is to say that the Court is stripped of all power to grant a remedy where an obvious wrong has been committed with resultant damage.

The Government places great stress on *Maxwell* v. *United States*, 3 Fed. 2d 906 (C. C. A.) aff. 271 U. S. 647. We are more than mindful of that opinion; yet it is clearly distinguishable. In the *Maxwell* case the contractor had made its contract with the Treasury Department on August 1, 1917 for the construction of a post office. Long prior thereto the War Department had entered into cost-plus contracts in the vicinity for cantonment work. Thus Maxwell submitted his bid in face of the then existence of the very condition he complained of, aside from the fact that

two different governmental agencies were involved each of which had the right to choose its own methods. In our case it was the same agency, viz: the War Department that first entered into a contract with the Contractor and then competed with him by the letting of cost-plus-fixed-fee contracts in the same locality.

Thus, the *Maxwell* case presents a situation where Maxwell took a contract for construction having nothing to do with the War program at a time when the war construction program was in full swing. In our case we were dealing with the War Department alone and the Contractor had a right to assume that the War Department would not, in the very same locality, enter into two types of contracts which it knew or should have known would place the Contractor at such an extreme disadvantage as to bankrupt him.

It also appears that Maxwell's chief complaint was as to the effect of governmental embargo and priority orders which was clearly an exercise of administrative and legislative functions generally applicable to all. That forms no part of our case.

The most vital distinction, however, lies in the fact that long after Maxwell's contract time had expired and long after the alleged governmental interferences had ceased, Maxwell actually conceded that the contract was in full force and effect. It appears that the Government had been willing to extend his time, yet long after the causes for complaint had been removed and the Government had asked Maxwell to proceed (fifteen months after the end of World War I) the Contractor arbitrarily refused to go ahead. The Government was then forced to complete the contract and simply sought to recover the excess costs of completion from the Contractor and its surety.

Point II

The Order Sustaining the Demurrer Is Directly Contrary to the Holding of This Court in The United States v. Joseph H. Beuttas, Decided by This Court, April 23, 1945, 89 Sup. Ct. Law. Ed., Advance Opin. 921.

In *United States* v. *Beuttas,* decided April 23, 1945, this Court had before it the question as to whether or not the Government could be held responsible if it were shown that its action hindered the contractor in the discharge of its obligations and caused him increased costs. In the cited case the Government first let a contract for the foundation of a building, and thereafter let a second contract for the superstructure. The first contractor claimed that the Government's action with respect to wage rates on the second contract increased his costs. The court there held:

> "As an alternative ground of decision, some of the judges below resorted to the principle that it is an implied condition of every contract that neither party will hinder the other in his discharge of the obligations imposed upon him, nor increase his cost of performance. They held that by inviting bids for the superstructure at minimum wages higher than those fixed in the respondents' contract for the foundations the petitioner breached this implied condition."

While in the cited case it was found on the facts that the Government's action did not cause an increase in costs, this Court nevertheless upheld the principle that if it could be shown that the costs were increased because of the Government's action, then the contractor was entitled to recover.

We respectfully submit that the action of the Court below deprived the petitioners of their right to show that the Government was responsible for the increased costs. It is elementary that all the facts stated in the complaint should have been deemed true for purposes of the demurrer.

We respectfully further submit that if that rule were followed in this case, then the action of the Court below was improper within the principle laid down by this Court in the *Beuttas* case.

Respectfully submitted,

M. Carl Levine,
David Morgulas,
Albert Foreman,
Attorneys for Petitioner,
521 Fifth Avenue,
New York City.

David Morgulas,
Of Counsel.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 179

STANDARD ACCIDENT INSURANCE COMPANY AND ALBERT E. MCKENZIE, AS TRUSTEE IN BANKRUPTCY OF THE GRAVES-QUINN CORPORATION, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 38–42) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on April 2, 1945 (R. 43). The petition for a writ of certiorari was filed on June 26, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether, in entering into a lump sum construction contract, the Government impliedly undertakes not to enter into cost-plus-fixed-fee construction contracts in the same locality while the lump sum contract is in the course of performance.

STATEMENT

Petitioners, a surety on a performance bond, and a trustee in bankruptcy, of the Graves-Quinn Corporation (hereinafter referred to as the contractor) (R. 1, 13–15, 38), filed a petition in the Court of Claims seeking to recover moneys on claims arising out of a contract between the Contractor and the United States (R. 1–13). The petition alleged three causes of action (R. 1–6, 6, 6–13), the third of which was the only one common to both petitioners (R. 6). Since the judgment dismissed the third cause of action alone (R. 43), only the facts alleged in the petition with respect to that cause of action are here pertinent. They are as follows:

On September 14, 1940, the contractor entered into a contract with the United States, through the War Department, for the construction of temporary houses at Harbor Defenses, Boston, Narragansett Bay, Massachusetts, at Portland, Maine, and at Newport, Rhode Island. The contract called for lump sum payment of $1,008,800. (R. 2, 16.) The petition alleged that although the con-

tractor "contemplated and understood that the Government would do nothing which would interfere or prevent the orderly and contemplated method of performing" its contract, "immediately after the awarding of the contract [the United States], through its duly authorized agencies made independent contracts" with other contractors "for the construction of various Government facilities in the immediate vicinity"; and that these "other contracts were for the most part let upon a cost plus a fixed fee basis." Petitioners then alleged that "the effect of the Government's action was that the Contractor was unable to employ laborers and mechanics in the normal course" since they were "being drawn to the cost plus fixed fees jobs"; that "unless the Contractor permitted laborers to be employed for longer hours resulting in the payment of overtime wages, practically no laborers would be available"; that "the Contractor was left with inefficient sources from which to draw his laborers"; and that "the effect of the award of the cost plus fixed fee contracts was to raise the price of the materials in the immediate vicinity, thereby forcing the Contractor to pay higher prices for materials necessary to the performance" of its contract. Petitioners further alleged that the United States "knew at or about the time of the advertising for bids resulting in the award" of the contract in question "that it intended to enter into very substantial construction contracts [in the same

vicinity] on a cost plus a fixed fee basis" and that "any Contractor having a lump sum contract in the immediate vicinity would be compelled to meet abnormal circumstances not contemplated or agreed to by the bidder." (R. 7.) On the basis of these allegations, petitioners averred that "the Contractor was damaged in the sum of $397,200" (R. 12) which sum "is now due and owing from the [United States] to the claimants" (R. 13). The petition further alleged the Contractor's claim had previously been presented to and rejected by the contracting quartermaster of the War Department (R. 8–10) and the Comptroller General (R. 10–12.)

On March 31, 1944, the United States filed a demurrer to this cause of action (R. 37–38). The court below sustained the demurrer and dismissed the petition as to this cause of action (R. 43) [1] on the ground that petitioners' allegations were "not sufficient to show that there was a breach of the contract in suit by the [United States] which would entitle the contractor or [petitioners] to recover the alleged increased performance costs as damages" (R. 41).

ARGUMENT

The court below properly ruled that petitioners' allegations failed to establish a right to recover, as damages, the contractor's alleged increased performance costs.

[1] The court below remanded the first and second causes of action to its General Docket (R. 43).

It is settled law that in the absence of fraud, accident, or mistake, supervening conditions or circumstances which may render a contractor's performance of a contract more difficult and expensive do not excuse the contractor from performance in accordance with the contract terms, or entitle it to relief after performance. *Jones* v. *United States,* 96 U. S. 24, 29; *Carnegie Steel Co.* v. *United States,* 240 U. S. 156, 164–165; *Day* v. *United States,* 245 U. S. 159, 161; *Columbus Ry. & Power Co.* v. *Columbus,* 249 U. S. 399, 412–414; *LeVeque* v. *United States,* 96 C. Cls. 250; *Williston on Contracts* (Rev. Ed., 1937) § 1963; *Restatement of Contracts,* § 467. "The answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation." *The Harriman,* 9 Wall. 161, 172–173. In an effort to circumvent this well established principle, petitioners invoke the rule that "it is an implied condition of every contract that neither party will hinder the other in his discharge of the obligations imposed upon him" (Pet. 11), and contend that the "acts of the Government" in letting cost-plus-fixed-fee contracts in the vicinity of the lump sum contractor so increased the latter's cost of performance as to constitute a "breach" of its contract with the Government (Pet. 7). Although the correctness of this rule is beyond challenge (*Restatement of Contracts,* § 315), petitioners disregard the obvious limitation upon it, *i. e.,* that it has no

application where, under the terms of the contract, surrounding circumstances, or customs of business, the hindrance was permitted or might have been anticipated by the parties. *Restatement of Contracts,* § 315 (1) (b) and illustration 3; *Williston, supra,* § 1293 A. The facts of this case and the applicable rules of law make it clear that the governmental action of which petitioners complain was not only permissible, but a risk naturally and properly to be anticipated by the contractor.

The contract in question was executed on September 14, 1940 (R. 2). Prior thereto, Congress had, on July 2, 1940, authorized the Secretary of War to "expedite the strengthening of the national defense" for the fiscal year ending June 30, 1941 by providing "for the necessary construction * * * at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto" (sec. 1 (a), 54 Stat. 712)[2] and specifically authorized the use of the "cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War" (*id.* at 713). The contracts about which petitioners complain were concededly authorized by this Act (Pet. 8). Parties to a contract are presumed to know of existing statutes which may affect its operation or performance, and the con-

[2] The appropriation Act providing moneys for the carrying out of this enactment was approved on September 9, 1940, 54 Stat. 872, 873.

tract in suit contains no express stipulation or warranty that the Government would not let contracts on a cost-plus-fixed-fee basis in the same vicinity.[3] It is thus clear that the contractor in the instant suit had, in the words of the court below, "assumed the risk of meeting the changed conditions of which complaint is now made" (R. 41).[4] This factor alone precludes petitioners' recovery against the United States. *Restatement of Contracts,* § 315 (1) (b).

Moreover, the United States when sued as a contractor cannot be held liable for an obstruction to the performance of a particular contract resulting from its general acts as a sovereign. *Horowitz* v. *United States* 267 U. S. 458, 461. It is clear that the action of the Government in letting the cost-plus contracts not only was permissible but, it must be assumed, was the most appropriate method "to expedite the strengthening of the national defense" (54 Stat. 712). Contrary to petitioners' contention, such action may not be made a basis

[3] Indeed, as the court below pointed out, the contract in question "expressly recognized the existence and effect of the National Defense and Appropriation acts above mentioned by deleting from the standard contract form art. 11 prohibiting the working of any laborer or mechanic more than eight hours in any calendar day" (R. 42). See Section 4 (b) of the Act of July 2, 1940, 54 Stat. 712, 714, and R. 9.

[4] Cf. *Wells Brothers* v. *United States*, 254 U. S. 83, 87, where Mr. Justice Clarke observed that "Men who take million-dollar contracts for Government buildings are neither unsophisticated nor careless."

for imputing inequitable conduct to the Government such as would sustain an action for an implied breach of contract. *Horowitz* v. *United States,* 267 U. S. 458; *Deming* v. *United States,* 1 C. Cls. 190; *Jones* v. *United States,* 1 C. Cls. 383; *Wilson* v. *United States,* 11 C. Cls. 513; *Maxwell* v. *United States,* 3 F. 2d 906 (C. C. A. 4), affirmed *per curiam,* 271 U. S. 647; *United States* v. *Warren Transp. Co.,* 7 F. 2d 161 (D. Mass.); cf. *Columbus Ry. & Power Co.* v. *Columbus,* 249 U. S. 399; *Megan* v. *Updike Grain Corp.,* 94 F. 2d 551 (C. C. A. 8).

Petitioners' assertion that their "complaint is not directed against any Governmental enactment" but against "the action of the War Department in its capacity as a contracting party" (Pet. 8) is not persuasive. This Court has recognized that the "'two characters which the government possesses as a contractor and as a sovereign cannot be thus fused'" and that "'the United States while sued in the one character [cannot] be made liable in damages for their acts done in the other * * * be they legislative or executive, so long as they be public and general.'" *Horowitz* v. *United States,* 267 U. S. at p. 461, quoting from *Jones* v. *United States,* 1 C. Cls. 383, 384. If petitioners mean to suggest that the War Department had agreed or undertook not to let in petitioners' vicinity such other contracts as might be deemed necessary to carry out and fulfill

the requirements of existing Acts of Congress (Pet. 8–9), such an agreement, or undertaking would, as the court below observed, "have been in violation of the acts of Congress and, therefore, beyond the authority conferred upon the contracting officer" (R. 41).

Contrary to petitioners' contention, the decision of this Court in *United States* v. *Joseph H. Beuttas,* No. 431, October Term, 1944, decided April 23, 1945, directly supports the decision below. In that case, this Court rejected the contention that the Government, by inviting bids for the construction of a superstructure at minimum wage rates higher than those specified in a contract for the construction of the foundation, had so increased the foundation contractors' costs of performance as to constitute an implied breach of their contract. The Court stated, in light of the findings of the Court of Claims, that there was "no basis for a holding that the Government knowingly hindered [the foundation contractors] in the performance of the contract or culpably increased their costs" (pamphlet p. 4). In the instant case, the Government's action in letting cost-plus-fixed-fee contracts pursuant to an Act of Congress would likewise not afford a sufficient "basis for a holding that the Government knowingly hindered * * * the performance," or "culpably increased" the costs of the contract in question.

CONCLUSION

The decision below is correct and no conflict exists. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

HAROLD JUDSON,
Acting Solicitor General.
RAWLINGS RAGLAND,
Acting Head, Claims Division.
PAUL A. SWEENEY,
JEROME H. SIMONDS,
Attorneys.

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